Supreme Court, U.S.
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No. 95-____ 95-339 AUG 28 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KOREAN AIR LINES CO., LTD.,

Petitioner,

—v.—

BARBARA SWIFT HOLLIE, as the Personal Representative of and Administratrix of the Estate of FRANCES MAE SWIFT, Deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, pursuant to the general maritime law principles of *Gaudet*[1], and in light of *Higginbotham*[2] and *Miles*[3], non-pecuniary damages for loss of society are recoverable for a death occurring on the high seas within the meaning of DOHSA[4] during the course of international air transportation within the meaning of the Warsaw Convention[5]?

The question presented for review is identical to the question as to which the Court granted review on April 17, 1995 in *Zicherman v. Korean Air Lines*, 43 F.3d 18 (2d Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995) (No. 94-1477).

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1 *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974).

2 *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

3 *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

4 Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*

5 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502.

LIST OF ALL PARTIES AND RULE 29.1 LISTING

A. Petitioner

The Petitioner is KOREAN AIR LINES CO., LTD. ("KAL") who was the defendant-appellant/cross-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Cargo Terminal Co., Ltd.
Air Korea Co., Ltd.
Daehan Oil Pipeline Corporation
Government Bonds
Hana Bank
Hanil Bank
Hanjin Construction Co., Ltd.
Hanjin Data Communication
Hanjin Heavy Industry Co., Ltd.
Hanjin International Corp.
Hanjin Int'l Japan Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Oil Refinery Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Investment Corporation
Korean French Banking Corporation
Korea Technology Development Co., Ltd.
Kyungki Bank, Ltd.
Peace Bank of Korea
Terminal One Management Inc.
The Company Fund
The Korea Economic Daily

B. Respondents

The Respondent is Barbara Swift Hollie, who was the plaintiff-appellee/cross-appellant in the Court of Appeals.

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IN THE

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OCTOBER TERM, 1995

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KOREAN AIR LINES CO., LTD.,

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BARBARA SWIFT HOLLIE, as the Personal Representative of and Administratrix of the Estate of FRANCES MAE SWIFT, Deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner KOREAN AIR LINES CO., LTD. ("KAL"), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on July 12, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is officially reported at 60 F.3d 90 (2d Cir. July 12, 1995) and

is reproduced in the Appendix hereto at A1a.[1] The relevant order of the district court is not officially reported and is reproduced in the Appendix hereto at A12a, 14a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 12, 1995.[2] The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable statute is the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.* ("DOHSA"). The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502 ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix hereto at A34a-35a.

STATEMENT OF THE CASE

A. Nature of the Case

The Petition involves only the question of whether nonpecuniary damages for loss of society are recoverable for an aviation death on the high seas within the meaning of DOHSA, upon the basis of the general maritime law principles enunciated in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), and in light of *Miles v. Apex Marine Corp.*,

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[1] References preceded by "A" refer to pages in the Appendix hereto.

[2] The parties consented to trial before Magistrate Judge Buchwald under 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73 and the appeal to the court below was pursuant to 28 U.S.C. § 636(c)(3) and Fed. R. Civ. P. 73(c).

498 U.S. 19, 30-33 (1990) and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622-25 (1978).

Decedent FRANCES MAE SWIFT ("decedent"), was a passenger on KAL flight KE007 who was killed when the flight was shot down by Soviet military aircraft on September 1, 1983. The decedent's death occurred on the high seas within the statutory scope of DOHSA, 46 U.S.C. App. § 761 (A35a). The Respondent is Barbara Swift Hollie, the decedent's adult sister, who sought damages on behalf of the estate of the decedent, herself and her four children (decedent's nieces and nephews), decedent's mother (now deceased), decedent's brother and decedent's aunt.

The action is governed by DOHSA and the Warsaw Convention, as supplemented by the Montreal Agreement.[3] Although the Warsaw Convention has been held to create a wrongful death action for passengers killed during "international transportation by air,"[4] the Convention does not set forth the types of recoverable compensatory damages in the event of the death of a passenger. This issue was intentionally left by the drafters of the Convention for determination by the internal damage laws of each contracting party to the Convention. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1488 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) ("*Korean Air II*"); *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267, 1283 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie I*"); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987); *see also Alcabasa v. Korean Air Lines*, __ F.3d __, 1995 Westlaw 464219 (D.C. Cir. Aug. 8, 1995).

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[3] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302).

[4] *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

DOHSA is the internal law of the United States which is applicable to and prescribes the recoverable damages for all deaths occurring on the high seas. 46 U.S.C. App. § 761 (A35a); *see Alcabasa*, 1995 Westlaw 464219 at 3. It is undisputed that the death of decedent occurred on the high seas within the statutory scope of DOHSA. 46 U.S.C. App. §§ 761, 762 (A35a). DOHSA specifically restricts recoverable damages to pecuniary damages only and does not permit the recovery of nonpecuniary damages for loss of society. *See* 46 U.S.C. App. § 762 (A35a); *Miles*, 498 U.S. at 30-33; *Higginbotham*, 436 U.S. at 622-25.

B. Disposition Below

1. The Damage Trial in the District Court

Prior to trial in the district court on the issue of recoverable compensatory damages,[5] KAL moved, *inter alia*, for a determination that DOHSA, as the federal law directly applicable to all deaths occurring on the high seas, prescribes the recoverable damages in this case, that DOHSA provides for the recovery of pecuniary losses only and that DOHSA prohibits the recovery of nonpecuniary damages for loss of society. A4a. The district court granted KAL's motion and, adopting its prior decision in another case arising out of the KAL flight KE 007 accident[6], found DOHSA to be the appropriate federal common law analog for deaths occurring on the high seas. A4a, 13a, 14a. The district court concluded, therefore, that nonpecuniary damages for loss of society and survivor's grief are not recoverable. A14a, 24a-26a.

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[5] The liability of KAL was determined in the context of the multidistrict litigation liability proceedings before Judge Aubrey Robinson, Jr. in the District of Columbia. *See Korean Air II*, 932 F.2d at 1476-79.

[6] *Park v. Korean Air Lines*, 24 Av. Cas. (CCH) 17,253 (S.D.N.Y. 1992) (reproduced in the Appendix hereto at A14a).

2. The Decision of the Court of Appeals

The Court of Appeals below was faced with the same issue that the Court agreed to review on April 17, 1995 in *Zicherman v. Korean Air Lines*, 43 F.3d 18 (2d Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995) (No. 94-1977)—whether nonpecuniary damages for loss of society are recoverable for a death on the high seas during the course of international transportation by air within the meaning of the Warsaw Convention.

The court below concluded, on the basis of the Second Circuit's prior decisions in *Zicherman* and *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) ("*Lockerbie II*"), that loss of society damages are recoverable.[7] A9a-10a. The Court of Appeals in *Zicherman* had concluded that nonpecuniary damages for loss of society are recoverable in a Warsaw Convention case "under the general maritime law principles of *Gaudet* and its progeny". 43 F.3d at 21.[8] The *Zicherman* court applied *Gaudet* because it considered itself bound by an earlier decision of the Second Circuit in *Lockerbie II*, an action involving an aircrash over land to which DOHSA did not apply, where the court adopted general maritime law to determine the types of "compensatory damages"[9] recoverable

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[7] The case was argued before the court below on April 5, 1995. KAL advised the court below by letter dated April 20, 1995 of the grant of *certiorari* in *Zicherman*. The decision of the court below was rendered on July 12, 1995.

[8] *Gaudet*, 414 U.S. 573, a non-DOHSA case, held that loss of society damages were recoverable by the financially dependent wife of a longshoreman killed in the territorial waters of the United States, under general maritime law, based on the doctrine of unseaworthiness. *Gaudet*, 414 U.S. at 585-90.

[9] The phrase "compensatory damages" is used to refer to damages except purely mental anguish and punitive damages, which are precluded by Article 17. *See Eastern Airlines v. Floyd*, 499 U.S. 530 (1991) (damages for mental anguish, standing alone, are not recoverable under the Convention because they cannot be considered a "bodily injury" within

in a Warsaw Convention death action.[10] *Zicherman*, 43 F.3d at 21-22. The *Lockerbie II* court adopted *Gaudet* as representative of general maritime law and, therefore, allowed for the recovery of loss of society damages in Warsaw Convention cases for deaths that occur over land. *Lockerbie II*, 37 F.3d at 828-29.

Although the death in this case occurred on the high seas within the meaning of DOHSA, unlike the deaths in *Lockerbie II*, the court below, relying upon and following its earlier decision in *Zicherman*, declined to apply DOHSA, and instead extended *Gaudet* to the high seas to allow for the recovery of loss of society damages. A9a-10a; *Zicherman*, 43 F.3d at 21-22.

The court below, therefore, reversed the district court's grant of KAL's pre-trial motion to dismiss the claims for loss of society damages and remanded the case for trial on loss of society damages.[11] A9a-11a.

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the meaning of Article 17); *Korean Air II*, 932 F.2d at 1483-90 (punitive damages are not recoverable under the Convention because the Article 17 phrase "damage sustained" is compensatory in nature).

[10] The *Lockerbie II* decision was itself premised on the Second Circuit's earlier holding in *Lockerbie I*, 928 F.2d at 1274-80, where the court held that the Warsaw Convention provides the "exclusive" cause of action for death and that "federal common law" governs this "exclusive" cause of action. *Lockerbie II* found general maritime law to be the best source of federal common law. *Lockerbie II*, 37 F.3d at 828-29.

[11] The court below affirmed the district court's grant of KAL's pre-trial motion to dismiss the claims for survivor's grief and KAL's post-trial motion to set aside the damage awards for loss of parental nurture, care and guidance to decedent's neices and nephews, as a matter of law. A8a. The court below also affirmed the damage award for decedent's pre-death pain and suffering. A5a-7a.

REASONS FOR GRANTING THE WRIT

I

CURRENTLY PENDING BEFORE THE COURT IS ANOTHER CASE INVOLVING THE PRECISE ISSUE PRESENTED FOR REVIEW IN THIS CASE

On April 17, 1995, the Court granted KAL's Cross-Petition for a Writ of Certiorari in *Zicherman v. Korean Air Lines*, 43 F.3d 18 (2d Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995) (No. 94-1477)[12], to review the precise question presented by the Petition in this case. The briefs on the merits have been submitted by the parties in the *Zicherman* case but no date has been set for oral argument as of the filing of this Petition.

The issue presented for review involves an important question of federal law that arises in every Warsaw Convention death case occurring on the high seas, territorial waters or on land. For example, in the litigation arising out of the KAL 007 air crash disaster, there currently are 12 cases pending on appeal in the Sixth, Ninth and D.C. Circuit Courts of Appeals, which involve the same issue as presented for review herein and where the district courts have taken conflicting positions on the recoverability of loss of society damages. **Sixth Circuit:** *Bickel v. Korean Air Lines*, Nos. 93-2144, 93-2206, 93-2259, 93-2341 (6th Cir.); *D. Jones v. Korean Air Lines*, No. 93-2549 (6th Cir.); *Bowden v. Korean Air Lines*, Nos. 94-1096, 94-1098 (6th Cir.); *James v. Korean Air Lines*, No. 94-1095 (6th Cir.); *M. Jones v. Korean Air Lines*, Nos. 94-

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[12] The Court also agreed to review the following issue, raised by the plaintiff, in *Zicherman*:

> Must a surviving parent or sibling prove that they were financially dependent on a decedent in order to recover damages for loss of society under the Warsaw Convention?

Question 1 from Plaintiffs' Petition for Writ of Certiorari in *Zicherman v. Korean Air Lines*, 115 S. Ct. 1689 (1995) (No. 94-1361).

1100, 94-1101 (6th Cir.) (appeals argued January 31, 1995) (district court held loss of society damages *are* recoverable); **Ninth Circuit:** *Saavedra/Yamaguchi v. Korean Air Lines*, Nos. 94-55018, 94-55060, 94-55161 (9th Cir.) (briefs submitted) (district court held loss of society damages are *not* recoverable); *Saavedra/Okai v. Korean Air Lines*, Nos. 94-55495, 94-55496 (9th Cir.) (briefs submitted) (district court held loss of society damages are *not* recoverable); *Kole v. Korean Air Lines*, Nos. 95-15117 (9th Cir.) (briefs submitted) (district court held loss of society damages *are* recoverable); **District of Columbia Circuit:** *Oldham v. Korean Air Lines*, Nos. 94-5321, 94-5338 (D.C. Cir.) (briefs submitted); *Ocampo v. Korean Air Lines*, Nos. 94-5323, 94-5324 (D.C. Cir.) (briefs submitted); *Maikovich v. Korean Air Lines*, Nos. 94-5371, 94-5382 (D.C. Cir.) (briefs submitted); *Forman v. Korean Air Lines*, Nos. 95-5230, 95-5231 (D.C. Cir.) (briefs not submitted) (district court held loss of society damages *are* recoverable). The Court of Appeals for the Sixth Circuit has advised the parties that, although the cases have all been argued, no opinion will be issued until the *Zicherman* case is decided by the Court. Similarly, the Court of Appeals for the Ninth Circuit has issued an Order staying oral argument in the pending appeals until the *Zicherman* case is decided by the Court.

In view of the foregoing, the importance of the issue is manifest. The Petition should be granted in this case for the same reasons as caused the Court to grant the Cross-Petition in *Zicherman*.

II

THE DECISION OF THE COURT BELOW CONFLICTS WITH DOHSA AND THE DECISIONS OF THE COURT THAT PROHIBIT AN AWARD OF LOSS OF SOCIETY DAMAGES UNDER GENERAL MARITIME LAW FOR AN AVIATION DEATH OCCURRING ON THE HIGH SEAS

Since the Court's decision in *Higginbotham*, no Circuit Court has disregarded DOHSA or permitted the recovery of loss of society damages for a death on the high seas under the general maritime law principles of *Gaudet*.[13] Yet, this is exactly what the court below has done in adopting *Zicherman* and the principles of *Gaudet* to the exclusion of DOHSA and in disregard of *Higginbotham*.

In *Zicherman*, the court characterized the issue to be "which federal law to apply"—DOHSA or *Gaudet*. 43 F.3d at 22. Contrary to the holding of *Higginbotham*, the *Zicherman* court chose *Gaudet* over DOHSA. 43 F.3d at 21-22. The court below has now done the same yet again.

In *Higginbotham*, a general maritime law and DOHSA action for the deaths of passengers arising out of a helicopter crash on the high seas, the Court addressed the question whether to apply the "rule chosen by Congress in [DOHSA] or the rule chosen by this Court in *Gaudet*" in determining the recoverability of loss of society damages. 436 U.S. at 623. The Court chose DOHSA. The Court specifically rejected any attempt to supplement the pecuniary damages allowed by DOHSA with nonpecuniary damages for loss of society available under general maritime law, as set forth in *Gaudet*. 436

[13] It is unquestioned that DOHSA applies to wrongful deaths involving aircraft accidents on the high seas. *Offshore Logistics, Inc. v. Tallentine*, 477 U.S. 207, 218-19 (1986); *Higginbotham*, 436 U.S. at 619; *Alcabasa*, 1995 Westlaw 464219 at 3-4; *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 263-64, 271-72 (1972); *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 635 (8th Cir. 1972); *D'Aleman v. Pan American World Airways*, 259 F.2d 493, 494-96 (2d Cir. 1958).

U.S. at 623-25. The Court limited *Gaudet* to the territorial waters and held, because Congress in DOHSA specifically had limited recoverable damages to pecuniary losses, that a court had no authority to authorize supplementary relief by judge-made maritime law that went beyond the remedies expressly authorized by Congress in DOHSA. 436 U.S. at 624-26.

Although *Higginbotham*, as *Zicherman* and this case, involved the death of an aviation passenger occurring on the high seas and the issue whether to apply DOHSA or *Gaudet* in determining whether loss of society damages are recoverable, the court below and in *Zicherman* simply ignored *Higginbotham* in deciding to choose *Gaudet*, rather than *DOHSA*, as the applicable law in a Warsaw Convention case involving an aviation passenger killed on the high seas.

The rationale of the court in *Zicherman* for disregarding DOHSA and the precedent of the Court is: (1) "[a]dopting one rule for Convention cases involving accidents over land and another for accidents over water would defeat" the perceived judicial desire for a uniform damage law to govern all Warsaw Convention cases, and (2) DOHSA's pecuniary loss provision conflicts with the "aim" of the Convention "to provide full compensatory damages". 43 F.3d at 21-22. In following this faulty reasoning of the court in *Zicherman*, the court below has perpetuated a ruling which runs counter to the Convention itself and the interpretation of the Convention by the Court and other Circuit Courts of Appeals.

A. The Holding That Judicial Desire for Uniformity Can Override a Statute Is Contrary to *Higginbotham*

The rejection by the court below of DOHSA in favor of *Gaudet*, on the authority of *Zicherman*, for the purpose of creating a uniform law of damages, is exactly what the Court in *Higginbotham* held a court cannot do.[14]

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[14] Uniformity with respect to the types of recoverable compensatory damages was not a goal of the Convention. This matter was left

The Court in *Higginbotham* specifically rejected any desire for uniformity as a justification for overriding DOHSA and for allowing the recovery of loss of society damages for a death on the high seas:

> We recognize today, as we did in *Moragne*, the value of uniformity, but a ruling that DOHSA governs wrongful-death recoveries on the high seas poses only a minor threat to the uniformity of maritime law . . . . As *Moragne* itself implied, *DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy*, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right. It is true that the measure of damages in coastal waters will differ from that on the high seas, but *even if this difference proves significant, a desire for uniformity cannot override the statute.*

Higginbotham, 436 U.S. at 624 (emphasis added and footnotes omitted).[15] *See Miles*, 498 U.S. at 33.

Thus, the first justification of the court below, relying upon *Zicherman*, for not applying DOHSA, is contrary to the holding of the Court in *Higginbotham* that a judicial desire for uniformity cannot serve as a basis for overriding the directly applicable statute.

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expressly by the drafters of the Convention to be resolved in accordance with the internal damage laws of each contracting state because the drafters found it "impossible" to adopt a uniform scheme for the types of recoverable compensatory damages. *Lockerbie I*, 928 F.2d at 1283-85, *Korean Air II*, 932 F.2d at 1488; Article 24, 49 Stat. 3020 (A34a); *see Alcabasa*, 1995 Westlaw 464219 at 2-4.

[15] The Court described the difference between the types of recoverable damages in territorial waters (loss of society allowed under *Gaudet*) and on the high seas (no loss of society allowed), as minor, because most federal statutes prohibit loss of society damages. *Higginbotham*, 436 U.S. at 624-25.

B. The Holding That the Aim of the Convention Was to Provide for a Full Recovery Is Contrary to the Convention and the Decision of the Court in *Floyd*

In rejecting DOHSA as the directly applicable law, the court in *Zicherman*, relied upon by the court below, also stated that DOHSA's pecuniary loss provisions cannot be reconciled with the " 'aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention,'. . . including non-pecuniary loss." 43 F.3d at 22, *quoting Lockerbie II*, 37 F.3d at 829.[16] This statement by the *Zicherman* court, adopted by the court below, simply is incorrect.[17] For over 25 years, the Court and the Circuit Courts have recognized that "the primary purpose of the contracting parties to the Convention [was]: *limiting the liability of air carriers* in order to foster the growth of the fledgling commercial aviation industry. . . ." *Floyd*, 499 U.S. at 546 (emphasis added); *see Trans World Air Lines v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).[18] The Court in *Floyd* clearly stated:

> Whatever may be the current view among Convention signatories, *in 1929 the parties were more concerned with protecting air carriers and fostering a new industry*

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[16] As noted *supra* at note 14, DOHSA and the Convention are not in conflict because DOHSA addresses the precise issue which the Convention expressly left to be determined by the internal law of the contracting states.

[17] The Convention itself places no restrictions on the *types* of "compensatory damages" recoverable. The Convention simply permits the recovery of those "compensatory damages" recognized by the applicable internal law of the contracting state.

[18] "The second goal of the Convention was to establish uniform rules governing documentation such as airline tickets and waybills and uniform procedure for addressing claims arising out of international transportation." *Floyd*, 499 U.S. at 546, n 11.

than providing full recovery to injured passengers,
. . . .

Floyd, 499 U.S. at 546 (emphasis added).

The Petition should be granted to bring the court below in line with the statutory provisions of DOHSA and the decisions of the Court in *Higginbotham* and *Floyd*.

III

THE HOLDING THAT GENERAL MARITIME LAW ALLOWS FOR THE RECOVERY OF LOSS OF SOCIETY DAMAGES IS CONTRARY TO THE GENERAL MARITIME LAW AS DEVELOPED BY THE COURT AND OTHER CIRCUIT COURTS

The holding of the court below, relying upon *Zicherman*, that *Gaudet*, and not DOHSA, is representative of the current state of general maritime law, conflicts with *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), *Higginbotham*, *Miles* and the decisions of other Circuit Courts of Appeals.[19]

The Court in *Miles*, 498 U.S. at 27-33, expressed a strong policy for restoring uniformity in the types of recoverable damages in federal law based cases, regardless of whether the action is brought under DOHSA, the Jones Act, 46 U.S.C. App. § 688 *et seq.* or general maritime law. In concluding that loss of society damages are not allowed for the death of a seaman occurring within the territorial waters, the Court stated in *Miles*:

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[19] As the Third Circuit recently stated: "*Gaudet* (together with its offspring, *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980)) represents the first, and last, time that the [Supreme] Court departed from the guidance of federal statutory wrongful death remedies in shaping recovery for wrongful death." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 634 (3d Cir. 1994), *cert. granted*, 115 S. Ct. 1998 (1995).

> Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

Miles, 498 U.S. at 33. Relying on *Moragne*[20], the Court in *Miles* also reaffirmed that federal maritime statutes "both direct and delimit" the actions of the courts, and that the courts must look to DOHSA and the Jones Act for guidance in determining whether to award loss of society damages, so that recovery or not of nonpecuniary damages remains uniform, no matter where the death occurs. 498 U.S. at 27, 30-33. For this reason, the Court in *Miles* emphasized that "[t]he holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen." *Miles*, 498 U.S. at 31; *see Higginbotham*, 436 U.S. at 623.[21]

After *Miles*, the Circuit Courts have recognized the limitations on *Gaudet* and have declined to extend it beyond those limits. *See Miller*, 989 F.2d at 1458 (limits on *Gaudet* have rendered it "virtually meaningless"); *Calhoun*, 40 F.3d 633-34; *Nichols v. Petroleum Helicopters*, 17 F.3d 119, 122-23 (5th Cir. 1994); *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1090-92 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994); *Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127, 130-31 (5th Cir.), *cert. denied*, 113 S. Ct. 190 (1992).

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[20] The Court in *Moragne*, 398 U.S. 375, recognized a general maritime wrongful death cause of action based on unseaworthiness for the death of a longshoreman killed on the territorial waters. *Cf. In re Mexico City*, 708 F.2d at 415 (taking guidance from *Moragne*, court held Warsaw Convention creates cause of action and directed courts to look to federal statutes, "particularly" DOHSA, to answer damage issues not addressed by the Convention).

[21] The cause of action for which *Gaudet* created a remedy was statutorily eliminated by the 1972 amendments to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq. Miles*, 498 U.S. at 28. *Gaudet* "has therefore been condemned to a kind of legal limbo; limited to its facts, inapplicable on its facts, yet not overruled." *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993).

The decision of the court below, as in *Zicherman*, disregards the admonitions of the Court in resurrecting *Gaudet* and extending it to the high seas and has created the very nonuniformity in the general maritime law that the Court sought to eliminate in *Miles*.

In rejecting DOHSA and adopting *Gaudet* as the applicable rule on recoverable damages for a death occurring on the high seas, the Second Circuit has placed itself in conflict with decisions of other Circuits which have declined to rely upon *Gaudet* and which have looked to federal statutes as the "primary guide" to determine recoverable damages for personal injury or death under general maritime law. *See Calhoun*, 40 F.3d at 634 (the Supreme Court "has narrowed [Gaudet] to its facts so that the decision may be, for all intents and purposes, a dead letter."); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1407-08 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995) (courts must look to maritime statutes for guidance in determining what damages are recoverable under general maritime law); *Kelly v. Panama Canal Commission*, 26 F.3d 597, 601-602 (5th Cir. 1994) (nonpecuniary damages are not available under general maritime law); *Nichols*, 17 F.3d at 122-23 (loss of consortium damages are not available under general maritime law); *Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 201-02 (1st Cir. 1994) (pursuant to analysis prescribed by *Miles*, a court may not extend remedies under general maritime law to include punitive damages or loss of parental or spousal society); *Walker v. Braus*, 995 F.2d 77, 82 (5th Cir. 1993) (on basis of *Miles*, but without deciding the issue, court "acknowledge[d] strength of argument that damages for loss of society may no longer be permitted in a general maritime law wrongful death action . . .")[22]; *Miller*, 989 F.2d at 1458-59 ("reject[ing]" the reasoning of *Gaudet* and instead following course set by *Moragne*, *Higginbotham* and *Miles*, court looked

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[22] On remand, the district court concluded that damages for loss of society are no longer available under general maritime law no matter where the death occurs. *Walker v. Braus*, 861 F. Supp. 527 (E.D. La. 1994).

primarily to federal maritime wrongful death statutes for guidance to conclude that punitive damages are not available under general maritime law). *Cf. Guevara v. Maritime Overseas Corp.*, __ F.3d __, 1995 Westlaw 437211 (5th Cir. July 26, 1995) (*en banc*).

The decision of the court below has placed the Second Circuit in isolation on this essential point of federal damage law. The Court should grant this Petition to bring the Second Circuit in line with the decisions of the Court and other Circuit Courts of Appeals. Review should be granted as well to reaffirm that *Higginbotham* and *Miles* are still valid, even where the death on the high seas involves a Warsaw Convention death. Otherwise, the decision of the court below, as the decision in *Zicherman*, in disregarding and departing from *Miles* and *Higginbotham*, may spawn an erosion of the holdings of the Court in this area of federal law. *See, e.g., Saunders v. Cunard Line Ltd.*, 1995 Westlaw 329323 (S.D.N.Y. June 1, 1995) (relying on *Lockerbie II*, court held loss of society allowed for personal injury in territorial waters).

CONCLUSION

For the foregoing reasons and in light of the grant of certiorari in *Zicherman*, the Petition for a Writ of Certiorari should be granted.

Dated: August 25, 1995

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 907, 1057—August Term, 1994

(Argued: April 5, 1995 Decided: July 12, 1995)

Docket Nos. 94-7208, 94-7218

BARBARA SWIFT HOLLIE, as the Personal Representative of and Administratrix of the Estate of FRANCES MAE SWIFT, Deceased,

Plaintiff-Appellee/Cross-Appellant,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendant-Appellant/Cross-Appellee.

Before:

NEWMAN, *Chief Judge*, and
WINTER and MAHONEY, *Circuit Judges.*

Appeal and cross-appeal from decisions in the United States District Court for the Southern District of New York (Naomi Reice Buchwald, *Magistrate Judge*),

involving damages issues arising out of the destruction of KAL Flight 007. We affirm the jury's awards for pain and suffering and for loss of support as supported by sufficient evidence. We affirm the setting aside of awards for loss of nurture because decedent had not established the functional equivalent of a parent-child relationship with her nephews and nieces. We affirm the dismissal of damages claims for grief of survivors because such damages are not available under federal maritime law. We reverse the dismissal of damages claims for loss of society and remand for trial.

Affirmed in part; reversed in part; remanded.

ANDREW J. HARAKAS, Tompkins, Harakas, Elsasser & Tompkins, White Plains, New York (George N. Tompkins, Jr., Jeanine C. Veracoechea, Tompkins, Harakas, Elsasser & Tompkins, on the brief), *for Defendant-Appellant/Cross-Appellee.*

DAVID M. SCHULLER, Law Offices of F. Lee Bailey and Aaron J. Broder, New York, New York (Aaron J. Broder, Law Offices of F. Lee Bailey and Aaron J. Broder, on the brief), *for Plaintiff-Appellee/Cross-Appellant.*

WINTER, *Circuit Judge*:

This is an appeal by Korean Air Lines Co., Ltd. ("KAL") and a cross-appeal by Barbara Swift Hollie

after a jury trial before Magistrate Judge Buchwald[1] concerning damages for the wrongful death of Frances Mae Swift. Hollie is the personal representative and administratrix of the estate of Frances Mae Swift. Swift died when KAL Flight 007 was shot down by a Soviet fighter on September 1, 1983.

After a consolidated trial on KAL's liability, the Judicial Panel on Multidistrict Litigation remanded the individual cases to their original courts for damage trials. Following the entry of judgment in the present case, and following the briefing of this appeal, we decided another appeal involving the crash of KAL Flight 007. *Zicherman v. Korean Air Lines Co.*, 43 F.3d 18 (2d Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995). *Zicherman* and the present case address many of the same legal issues. We assume familiarity with *Zicherman* and set forth only those facts necessary for the resolution of this appeal.

BACKGROUND

Frances Mae Swift was a passenger on Flight 007 assigned to seat number 27D. After Flight 007 was struck by shrapnel from a Soviet proximity missile, it remained airborne for up to twelve minutes before crashing into the sea. The passengers likely survived the impact of the explosion and had time to don oxygen masks. All passengers perished in the subsequent crash.

Swift had been an occupational therapist earning a salary of approximately $30,000 per year that was supplemented by a private occupational therapy practice.

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[1] The parties consented to trial before a United States Magistrate Judge under 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. We hear this appeal pursuant to 28 U.S.C. § 636(c)(3) and Fed. R. Civ. P. 73(c).

She gave at least partial support to her developmentally disabled brother Alton Swift; her visually impaired sister, Barbara Swift Hollie; her aunt, Emma Bradley; and her nieces and nephews, Mark Anthony Swift, Glen Eric Lee, Gail Hutcherson Orr, and Charnell Letrice Swift. Her relationship with her nieces and nephews—Hollie's children—was very close, although she lived in Detroit, Michigan and her nieces and nephews lived in Rochester, New York. The nieces and nephews viewed her as a role model, and she provided them with mentoring and advice. Swift made several short visits each year to see her sister's children.

Prior to the trial on damages, the district court dismissed the claims against KAL for damages for loss of society and for grief of survivors. The jury returned a verdict awarding damages for: (i) pain and suffering to Swift's estate; (ii) loss of support to Swift's siblings and aunt, and (iii) loss of support and loss of nurture and guidance to her nieces and nephews. The district court set aside the damage awards for loss of nurture and guidance.

In its appeal, KAL challenges: (i) the sufficiency of the evidence supporting the pain and suffering award to the Swift estate; and (ii) the sufficiency of the evidence supporting the award to Swift's brother of $43,000 for loss of support. In her cross-appeal, Hollie challenges: (i) the setting aside of the jury awards to decedent's nieces and nephews; (ii) the dismissal of claims for grief of survivors; and (iii) the dismissal of claims for loss of society.

DISCUSSION

The Warsaw Convention governs personal injury actions by passengers arising out of international flights. *Zicherman*, 43 F.3d at 21; *In re Air Disaster at Lockerbie, Scot.*, 928 F.2d 1267, 1273-78 (2d Cir.) ("*Lockerbie I*"), *cert. denied*, 502 U.S. 920 (1991). However, "because the Warsaw Convention is silent on the question of damages, we look to federal law to decide such issues." *Zicherman*, 43 F.3d at 21; *see also Lockerbie I*, 928 F.2d at 1278-79. Thus, we apply federal maritime law, which governs the availability of damages for injuries occurring on international flights. *In re Air Disaster at Lockerbie Scot.*, 37 F.3d 804, 828-29 (2d Cir. 1994) ("*Lockerbie II*"), *cert. denied*, 115 S. Ct. 934 (1995).

A. *Pain and Suffering*

KAL challenges the sufficiency of the evidence supporting the pain and suffering award to the Swift estate. In evaluating the legal sufficiency of the evidence, we view it in the light most favorable to Hollie. *See, e.g.*, *Toltec Fabrics v. August Inc.*, 29 F.3d 778, 782 (2d Cir. 1994).

Two expert witnesses testified for the plaintiff at trial on the issue of pre-death pain and suffering. Captain James McIntyre is an experienced Boeing 747 pilot and aircraft accident investigator. He testified that Flight 007's tail was struck by shrapnel from a proximity missile. This shrapnel probably caused a hole smaller than two feet in diameter, resulting in decompression but leaving the passengers sufficient time to don oxygen masks. McIntyre testified that, based upon his estimate of the extent of damage the aircraft sustained, all pas-

sengers survived the initial impact of the shrapnel from the missile explosion. In McIntyre's expert opinion, at least twelve minutes elapsed between the impact of the shrapnel and the crash of the plane, and the passengers remained conscious throughout.

Robert Elzy is an aviation physiologist who testified about the effects of decompression on the human body. Elzy described the physical pain in the ears, sinuses, and intestines caused by changes in altitude and cabin pressure. In his opinion, the passengers would have felt this pain throughout the ordeal.

This evidence is sufficient to support a finding that Swift survived the missile explosion, remained conscious, and suffered pain. We have repeatedly held that an award for conscious pain and suffering can be based on such evidence. *See Zicherman*, 43 F.3d at 23; *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 206 (2d Cir. 1984).

Indeed, the evidence offered by Hollie on this issue differed little from the evidence upheld as sufficient in *Zicherman*. In that case, the plaintiff also offered the testimony of expert witnesses. An aeronautical engineer testified that the missile blew a hole in Flight 007's rear fuselage and that the plane probably remained airborne for twelve minutes after being struck. *Zicherman*, 43 F.3d at 20-21. Robert Elzy, the aviation physiologist who testified in the present case, testified that a hole would cause decompression and that passengers had sufficient time to don oxygen masks which would allow them to remain conscious during the plane's descent. At oral argument, counsel for KAL conceded that the only distinction between Swift and the plaintiff in *Zicherman* was the location of their assigned seats. This distinction

is of no relevance where a plaintiff has offered evidence from which it can reasonably be inferred that all passengers suffered before impact. *See id.* at 23.

B. *Loss of Support*

KAL challenges the sufficiency of the evidence underlying the jury's award of $43,000 for loss of support to decedent's brother, Alton Swift.

In order to obtain an award for loss of support under federal maritime law, there must be a showing of full or partial dependency, *Zicherman*, 43 F.3d at 23, and of the extent of lost pecuniary benefits, *Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1093 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994). *See First Nat'l Bank v. National Airlines*, 288 F.2d 621, 624 (2d Cir.) (distinguishing dependency from pecuniary loss), *cert. denied*, 368 U.S. 859 (1961). Mathematical certainty is unnecessary to prove the amount of pecuniary loss, but there must be some evidence from which the jury can estimate future support without engaging in conjecture. *See Shatkin*, 727 F.2d at 207.

KAL does not challenge the finding of dependency but contends that there was no basis for the jury to infer the amount of pecuniary loss. However, the testimony of Alton Swift, Barbara Swift Hollie, and the aunt with whom Alton Swift resides, Emma Bradley, was sufficient to allow the jury to find that Swift would have contributed approximately $2,000 per year in benefits to Alton for the remainder of her working life. This testimony indicated that Swift took Alton shopping, bought him gifts, and gave him food. We conclude that it was sufficient to support the verdict.

C. *Loss of Nurture and Guidance*

Hollie challenges the district court's grant of KAL's motion to set aside the jury award to Swift's nieces and nephews for loss of nurture, care, and guidance.

Damages for the loss of nurture are intended to compensate for the loss of parental guidance and intellectual and moral training to a child. *See Solomon v. Warren*, 540 F.2d 777, 788 (5th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Moore-McCormack Lines v. Richardson*, 295 F.2d 583, 593 n.9a (2d Cir. 1961), *cert. denied*, 368 U.S. 989 (1962); *Red Star Towing & Transp. Co. v. The "Ming Giant"*, 552 F. Supp. 367, 377 (S.D.N.Y. 1982).

Although the children of a decedent may recover damages for loss of nurture, *see Lockerbie II*, 37 F.3d at 830, we have never determined whether a person who is not actually a biological or adoptive offspring may recover damages for loss of nurture. At least one state's highest court has allowed recovery for loss of nurture by a person other than the children of the deceased. *Gonzalez v. New York City Hous. Auth.*, 572 N.E.2d 598, 601 (N.Y. 1991) (permitting adult grandchildren of decedent to recover damages for loss of guidance). Significantly, however, in *Gonzalez* the deceased grandmother "had raised" her grandchildren because their father had died and their mother was mentally ill. *Id.* at 599.

There is little reason for us to hold that, as a matter of general federal maritime law, damages are available for the loss of nurture only where the decedent is a biological or adoptive parent. If the decedent had fully undertaken a parent's role, both the nature and extent of damage would be similar, and a distinction based solely on birth or legal relationship would be arbitrary. Dam-

ages for loss of nurture assume the functional equivalent of the singular relationship of parent and child. The death of an adoring neighbor or schoolteacher will not support an award for loss of nurture. Conversely, a person raised by a foster parent or grandparent might be able to recover for loss of nurture, so long as the decedent had fulfilled a parental role. *Cf. O'Rourke v. Eastern Air Lines*, 730 F.2d 842, 859 (2d Cir. 1984) (reducing award for loss of parental guidance and training because decedent was at sea ten months per year).

Swift's nieces and nephews undoubtedly received guidance from her, but Swift did not act as their parent. Swift lived in Detroit while her nieces and nephews lived in Rochester with their mother, Barbara Swift Hollie. Although Swift spoke regularly to the children about important topics such as education, visited them several times a year, and acted as a role model and mentor, this interaction never rose to the level of full parental guidance.

D. *Grief of Survivors*

Hollie cross-appeals from the dismissal of her claim for damages for the grief suffered by Swift's survivors. However, we have held that federal maritime law does not permit recovery of damages for such grief. *Zicherman*, 43 F.3d at 23.

E. *Loss of Society*

Hollie's cross-appeal challenges the district court's pre-trial ruling dismissing claims for loss of society. Subsequent to the district court's ruling, we held that damages for loss of society are available in cases brought under the Warsaw Convention, *Lockerbie II*, 37

F.3d at 828-30, whether the accident occurred over water or land, *Zicherman*, 43 F.3d at 21.

Only spouses and dependents may recover for loss of society. *Zicherman*, 43 F.3d at 22; *Lockerbie II*, 37 F.3d at 830. "The test of dependency is the existence of 'a legal or voluntarily created status where the contributions are made for the purpose and have the result of maintaining or helping to maintain the dependent in [his or her] customary standard of living.' " *Zicherman*, 43 F.3d at 22 (quoting *Petition of United States*, 418 F.2d 264, 272 (1st Cir. 1969)).

In the present case, the jury was properly instructed on dependency. The jury charge stated:

> In order for a relative to be dependent under the law the pecuniary contribution from the decedent must have been in whole or in part a means of maintaining the relative in the manner in which they had been living. And you must also consider whether the relative looked forward to and relied upon the continuance of decedent's contribution to maintain that standard of living. The provision of money or necessary items on a regular or systematic basis tends to support a finding of dependency.

This charge comported with *Zicherman* in establishing dependency for the purposes of assessing damages based on loss of society. The jury found that Swift's siblings, her aunt, and her nieces and nephews were dependents. That finding has not been challenged in KAL's appeal.

Hollie is therefore entitled to have a jury assess the claims for loss of society made by these seven relatives. The parties agreed at oral argument that a subsequent trial could be limited to damages for loss of society. We therefore remand for such a trial.

We leave to the district court the task of determining whether the jury should be informed of the prior award for loss of support. Hollie also seeks a ruling that, at the trial for damages on loss of society, the dependent relatives be permitted to testify as to the effect of the loss of the decedent's love and companionship. Loss of society damages represent compensation for "loss of positive benefits" while mental anguish or grief damages represent compensation for the "emotional response to . . . wrongful death." *Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 585-86 n.17 (1974). We leave to the district court the task of determining whether particular evidence is relevant to establishing the loss of society or relevant only to establishing mental injury or grief.

CONCLUSION

The jury's award for Swift's pain and suffering is affirmed. The award of damages to Alton Swift for loss of support is affirmed. The district court's grant of KAL's motion to set aside the jury award to Swift's nieces and nephews for loss of nurture is affirmed. The grant of KAL's motion to dismiss the claims for damages for grief of survivors is affirmed. The district court's grant of KAL's pre-trial motion to dismiss the claims for damages for loss of society is reversed and remanded for trial.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

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83 Civ. 7899 (PNL)

June 9, 1993 2:05 p.m.

BARBARA SWIFT HOLLIE, as the Personal Representative of and the Administratrix of the Estate of FRANCES MAE SWIFT, deceased,

Plaintiff,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendants.

HSING-WU WANG, as the Personal Representative and Intended Administrator of the Estate of YUN-SHENG WANG, Deceased,

Plaintiffs,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendants.

Before:

HON. NAOMI REICE BUCHWALD
Magistrate Judge.

APPEARANCES

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PETER TAMIGI
ANDREW J. HARAKAS

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[5] [THE COURT]: The first motion is the motion by defendants that I adopt my earlier decision in the Park case as the governing law in these two actions, being Hollie and Wang. That motion is granted.

MR. BRODER: Could the record just recite what that is so—I don't have it right before me, your Honor. Just briefly.

THE COURT: Excuse me?

MR. BRODER: Could the record—

THE COURT: You want me to recite a twenty-five-page opinion?

MR. BRODER: Just the principal thrust.

THE COURT: I am not going to recite it. You have a copy of the decision in Park. There is no confusion about that.

* * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 83-Civ-7900 (PNL)
October 29, 1992

KYUNG HWA PARK, as the Personal Representative and the Administratrix of the Estate of HAN TAE PARK, Deceased

—v.—

KOREAN AIR LINES CO., LTD.

Kevin Mosley, Bailey & Broder, New York, NY, *for plaintiff.*

George N. Tompkins, Jr. and Andrew J. Harakas, Condon & Forsyth, New York, NY, *for defendant.*

BUCHWALD, J.: This memorandum is addressed to three *in limine* motions.[1] First, the defendant moves to strike plaintiff's jury demand. Second, the defendant seeks a ruling that the Death on the High Seas Act ("DOHSA") governs the determination of damages. In addition, plaintiff seeks a ruling permitting her to maintain a wrongful death action under Korean law pursuant to Section 4 of DOHSA. For the reasons set forth below, all three *in limine* motions are denied.

[1] The parties have consented to trial under 28 U.S.C. § 636(c)(1) and Fed. R. Civ. P. 73 before a United States Magistrate Judge. The consent, dated May 20, 1992, was signed contemporaneously with an order from Judge Leval directing this court to conduct a simultaneous bench and jury trial.

PROCEDURAL AND FACTUAL BACKGROUND

This litigation arises out of the downing of Korean Air Lines flight KE007 over the Sea of Japan by Soviet aircraft on September 1, 1983. All the passengers and crew died as a result of the incident. This complaint alleged wrongful death and survival actions under the Warsaw Convention ("the Convention") and DOHSA, as well as state law based claims. Jurisdiction was predicated on federal question (the Warsaw Convention and DOHSA), 28 U.S.C. § 1331, and diversity of citizenship, 28 U.S.C. § 1332.

Along with numerous others, this case was consolidated by the Judicial Panel for Multi-District Litigation before Chief Judge Aubrey E. Robinson, Jr. of the United States District Court for the District of Columbia. After motions addressed to the liability of the named defendants, Judge Robinson scheduled a trial on the issue of whether the plane crash was proximately caused by the "wilful misconduct" of the sole remaining defendant, Korean Air Lines ("KAL"). By a pre-trial motion, KAL sought to strike the jury demands in all of the consolidated complaints, including the case now before this court. Although KAL acknowledged that the Convention creates a cause of action for wrongful death triable to a jury, it argued that, since the incident occurred outside of the territorial waters of the United States all of the plaintiffs' claims were governed exclusively by DOHSA. *In re Korean Air Lines Disaster of September 1, 1983*, 704 F.Supp. 1135, 1151 (D.D.C. 1988) ("KAL"). Further, KAL maintained that, as an admiralty statute, DOHSA did not provide for jury trials. *Id.*

KAL's argument was rejected. Judge Robinson held that DOHSA was not the exclusive basis for recovery and that, given Convention and state-based claims which were triable to a jury, plaintiffs were entitled to a jury trial on all their claims. Accordingly, he denied KAL's motion. *Id.* at 1153.

After trial, the jury returned a judgment finding wilful misconduct on the part of KAL and awarding $50 million in punitive damages to plaintiffs. On appeal, the Circuit Court

affirmed the jury's finding of wilful misconduct, but held that punitive damages were not recoverable under the Warsaw Convention. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir.) *cert. denied*, 112 S.Ct. 616 (1991) ("KAL").

Subsequently, the individual cases were remanded to their originating districts for damage determination. The case before us was among those returned to Judge Leval of the Southern District of New York. KAL has since moved in cases before Judge Robinson and Chief Judge Platt of the Eastern District of New York to strike plaintiffs' jury demands for the damage determination phase of this litigation. In each instance, the motion was denied. *See Yun v. Korean Air Lines*, No. 84-Cv-2371, 1992 U.S. Dist. LEXIS 11573, at *17 (E.D.N.Y. June 24, 1992);[2] *In re Korean Air Lines Disaster of September 1, 1983*, No. 83-2793, 1992 WL 200431, at *5 (D.D.C. April 1, 1992).[3]

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[2] As an alternative ground for his denying KAL's motion, Judge Platt held that Judge Robinson's earlier decision, *KAL*, 704 F.Supp. 1135, was the law of the case. Judge Platt rejected as disingenuous *KAL*'s argument that its failure to appeal the issue precluded an application of the law of the case doctrine and noted that apparently KAL did not appeal because it could not simultaneously brief its appeal of the jury's finding of wilful misconduct and the punitive damages award, and abide by the D.C. Circuit's proscribed page limit. *See Yun*, 1992 U.S. Dist. LEXIS 11573, at *5-6, 11.

[3] The parties have informed the Court that Judge Robinson had certified the jury trial issue for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On or about June 9, 1992, the Court of Appeals for the District of Columbia accepted the appeal. *See Yun*, 1992 U.S. Dist. LEXIS 11573, at *6 n.3.

DISCUSSION

A. Motion to Strike Plaintiffs' Jury Demand as to the Determination of Damages

KAL's motion to strike plaintiff's jury demand does not require extensive discussion. Prior to signing the consent to trial before this court, KAL raised its objection to plaintiff's jury demand before Judge Leval. However, as a condition to the consent, Judge Leval ordered that a simultaneous jury and bench trial be conducted. KAL again raises this objection, presumably to insure that the issue has been preserved for appeal to the Second Circuit.

In addition to the practical resolution of this issue by Judge Leval, plaintiff's entitlement to a jury trial for their Warsaw Convention and DOHSA claims has been addressed at several junctures of this litigation and resolved against KAL. *See KAL*, 1992 WL 200431, at *1, *5; *Yun*, 1992 U.S. Dist. LEXIS 11573, at *17; *KAL*, 704 F.Supp. at 1151. Further, defendant's submissions provide no substantial reason to depart from the thoughtful decisions of Judges Robinson and Platt. Thus, if this issue were truly presented to us, we would deny defendant's motion to strike plaintiff's jury demand.

B. Motion Regarding the Applicable Law to the Determination of Damages

Defendant's motion seeking a ruling as to the law applicable to the determination of plaintiff's damages raises a myriad of over-lapping issues. At the outset, it should be noted that the parties agree that both the Warsaw Convention and DOHSA provide a basis for claims in this case. First, the parties do not dispute that the Warsaw Convention ("the Convention"), the international treaty related to airplane crashes, provides a source of governing law. Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, entered into force Oct. 29, 1934, *reprinted at* 49 U.S.C.

App. § 1502 note (1976). Likewise, the fact that the crash of KAL flight KE007 occurred more than three miles from the shore of any state, the District of Columbia, or any other territory of the United States brings this action within the purview of DOHSA.[4] 41 Stat. 537, 46 U.S.C. § 761, *et seq.* However, KAL argues that, for airplane accidents on the high seas,[5] DOHSA is the sole applicable federal law. Notwithstanding the remedies otherwise available under federal tort law, KAL argues that, "[s]ince DOHSA expressly sets forth the measure and types of damages recoverable for a death on the high seas, a court cannot apply federal common law to determine the measure of damages" and the court must apply DOHSA. Defendant's Reply Memorandum p.5.[6] Plaintiff, on the other hand, takes the position that the

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[4] For purposes of this opinion the high seas is defined as navigable waters not within one marine league, or three nautical miles, of United States territory. This definition coincides with DOHSA's jurisdictional mandate. *See* 46 U.S.C. § 761; *Off-shore Logistics, Inc v. Tallentire*, 477 U.S. 207, 209 (1985).

[5] It is further undisputed that DOHSA applies to airplane crashes that occur on the high seas. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 271 n.20, 274 n.26 (1972). Nevertheless, in extending DOHSA to airplane crashes, the Court noted that Congress has consistently recognized the distinction between admiralty and aviation. *Id.* at 270; *KAL* 704 F.Supp. at 1157 n 50. Although the legislative history of DOHSA indicates that Congress was concerned with insuring a federal remedy for disasters on the high seas, there is no indication that Congress intended DOHSA to encompass aviation disasters. *KAL* 704 F.Supp. at 1157 n.50.

[6] Not surprisingly KAL concludes that, since DOHSA sets the parameters of recovery in this case, plaintiff can only recover pecuniary damages. KAL's position would lead the court to disallow plaintiff's claim for decedent's pre-death pain and suffering, loss of consortium and loss of comfort. Defendant's Motion Regarding the Applicable Law to the Determination of Damages p. 7 & n 6.

Convention and DOHSA provide independent causes of action that may proceed concurrently. As a result, plaintiff concludes that the measure of damages is determined not only by DOHSA,[7] but also by the Convention and general maritime law. Thus, the overriding issue here focuses on the proper interplay between two schemes of tort liability that stand in proximate equality under the Supremacy Clause.[8]

(1) The Warsaw Convention

We begin our discussion with a brief overview of the Warsaw Convention, which was ratified by the United States Senate in 1934 and modified in 1966 by the Montreal Agreement. The Convention had two primary goals: first, to establish uniformity in the aviation industry with regard to "the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims"; and second, to limit air carriers' liability in the event of accidents. *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267, 1270 (2nd Cir. 1991)

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[7] In addition, plaintiff maintains that under Section 4 of DOHSA she may maintain a cause of action for wrongful death under Korean law. Plaintiff alleges that Korean wrongful death law provides compensation for the grief and mental anguish of the decedent's family. See Affidavit of Dong Hwa Kim. This argument will be addressed below.

[8] This proximate equality between the Convention and DOHSA means that a preemption analysis is inappropriate. Instead, we must be guided by two principles. First, in the event of conflict, treaties are given effect over existing statutes. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1146 (3rd Cir. 1989), *cert. denied*, 493 U.S. 944 (1988); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936 (D.C.Cir. 1986). Thus, the Convention, enacted in 1934, would supersede DOHSA, enacted in 1920. Second, both the treaty and pre-existing federal statutes should be given effect whenever possible. *U.S. v. Palestine Liberation Organization*, 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988).

("Lockerbie") (*quoting* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 498-99 (1967)). To accomplish its purpose, the Convention and the subsequent modifications have adopted a liability system that involves a trade-off between the passengers' right to recover for damages and the airlines' need to contain liability costs. The resulting balance was intended to be a uniform international liability scheme. *Id.* at 1280.

Under Article 17, the Convention subjects international air carriers to strict liability for

> damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place aboard the aircraft or in the course of any of the operations of embarking or disembarking.[9]

49 U.S.C. App. § 1502. *See also* Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol, approved by C.A.B. Order No. E-23680, *reprinted at* 49 U.S.C. App. § 1502 Note (1976). However, the air carrier's liability is limited to $75,000 unless the damages arise, as has been found here, from the air carrier's "wilful misconduct," *see* Article 25 of the Convention, in which case the air carrier is subject to unlimited liability for compensatory damages. *Lockerbie*, 928 F.2d at 1287 *accord KAL*, 932 F.2d at 1490. Significantly, even when the liability limit does not apply, the remaining terms and conditions of the Convention still govern the action. *Lockerbie*, 928 F.2d at 1286.

Article 24(2) states that the Convention's provisions apply "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." 49 U.S.C. App. § 1502 note. Commentators and case

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[9] The official text of the Convention is written in French. *Eastern Airlines v. Floyd*, 111 S.Ct 1489, 1493 (1991); *Lockerbie*, 928 F.2d at 1280. Since our opinion does not involve parsing the text of the Convention, it is unnecessary to examine the text in its original language.

law are in accord that this language leaves the measure of damages to the internal law of parties to the Convention. *Lockerbie*, 928 F.2d at 1283.

(2) The *Lockerbie* Decision

In advancing these motions, neither party has properly incorporated the analysis used by the Second Circuit in *Lockerbie*, 928 F.2d at 1267. *Lockerbie* involved wrongful death actions, brought under the Convention and state law, arising from two separate cases: one involving the crash of Pan Am Flight 103 over Lockerbie, Scotland; the other a hijacking in Karachi, Pakistan. The Second Circuit addressed the question of whether, as a matter of law, plaintiffs could recover punitive damages under the Convention.

Based largely on the need for uniformity, the Second Circuit held that a Convention wrongful death action preempts state law causes of action. *Id.* at 1276. In support of its holding the court stated:

> The way the other [High Contracting] parties have viewed the Convention, its emphasis on uniformity, and the need for a single, unified rule on such points as the recoverability of punitive damages lead to the belief that the Convention should be interpreted as making all actions—other than those based on the Convention—exclusive under it.

Id. at 1274.[10]

In order to insure uniformity and consistency the court adopted the federal common law of torts as the governing

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[10] The Supreme Court, on the other hand, has declined to decide the issue of whether the Convention preempts state law claims. *See Eastern Airlines v. Floyd*, 111 S.Ct. 1489, 1502 (1991); *Air France v. Saks*, 470 U.S. 392, 408 (1985). The exclusivity issue in *Lockerbie, Floyd,* and *Saks* involved only competing state law claims, whereas here there is a competing federal claim.

substantive law for actions arising under the Convention. *Id.* at 1278-79. Nevertheless, the court noted that, despite the Convention's reliance on internal law to define recoverable damages, local causes of action may not be used to circumvent the Convention. *Id.* at 1282. In the event of inconsistencies between local remedies and that Convention's principles, the Convention prevails. Applying that rationale, the court held that, although punitive damages were recoverable under federal law, the Convention did not allow for them. Accordingly, plaintiffs' claims for punitive damages were dismissed. *Id.* at 1288. *Accord KAL*, 932 F.2d at 1485 (stating that if a recovery is inconsistent with the underlying principles of the Convention that recovery is precluded.)

Each of the main themes of *Lockerbie* is instructive here: (1) uniformity in the laws governing carrier liability and certainty in the application of those laws is the primary purpose of the Convention; (2) to insure this uniformity and consistency courts must apply federal common law to Convention actions; and (3) no cause of action can be inconsistent with the Convention's principles.

While the court in *Lockerbie* explicitly stated that the Convention was to be construed under the federal common law of torts, it left to future courts the task of delineating this federal common law. In determining the rights of a plaintiff asserting a Convention cause of action, courts should refer to other federal statutes for guidance. *Id.* at 1279 (*citing In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983). However, contrary to KAL's assertion, no single federal statute embodies the federal common law. *See In re Inflight Explosion on Trans World Airlines Approaching Athens, Greece on April 2, 1986*, 778 F.Supp. 625, 636 (E.D.N.Y. 1991) ("TWA"). Rather, statutes comprise only a part of the common law and must be examined in connection with other statutes and, in so far as possible, prevailing state law standards. *See Miles v. Apex Marine Corp.*, 111 S.Ct. 317 321 (1990).

To place the parties' conflicting positions in context, it is useful to distinguish between the two modern common law causes of action available in the event of death. The two—wrongful death and survival actions—are designed to compensate for different kinds of loss. 2 S. Speiser, *Recovery in Wrongful Death* § 14.1 (2d. ed. 1975 & Supp. 1990) ("Speiser"). Although both actions may stem from the same tortious act, a wrongful death award compensates the estate or family members for the economic loss suffered as a result of the death, including loss of support and funeral expenses, whereas a survival action continues the injured person's own claim for injuries which accrued before death. 2 Speiser, § 14.1. A survival action, in other words, permits recovery by the decedent's personal representative, usually on behalf of the estate, for damages that the decedent could have recovered had he lived. Without a survival action the tortfeasor may escape liability for certain elements of damages including personal injury or pain and suffering prior to the decedent's death. *TWA*, 778 F.Supp. at 630.

As a result of the different conceptual bases of a wrongful death and survival action, each provides for distinct elements of recovery.[11] In this case, plaintiff is pursuing claims within both the wrongful death and survival rubrics. Specifically, plaintiff here is seeking damages for, *inter alia*, loss of pecuniary support, loss of decedent's services and nurture, loss of inheritance, loss of love and the beneficiaries' grief and mental anguish. Plaintiff is also seeking compensation for decedent's conscious mental and physical pain and suffering prior to his death. Plaintiff's Proposed Findings of Facts and

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[11] The distinct nature of these actions prevents a duplication in recovery of items of damages. The court can insure that double recovery does not occur by either terminating survival damages at the decedent's death, with damages arising subsequently to be considered in the wrongful death action, or by reducing the survival recovery by the amount of loss of support awarded to the wrongful death beneficiaries. 2 Speiser, § 14.2.

Conclusions of Law p. 6. Defendant, on the other hand, maintains that plaintiff's recovery is limited to pecuniary loss.

Our task is first to determine the damages available for wrongful death under federal common law and the extent, if any, that DOHSA conflicts with federal common law. Second, we must determine whether plaintiff may maintain a survival action under federal common law. Finally, assuming that plaintiff may properly plead a Korean law cause of action under DOHSA, we must determine whether the Convention precludes the application of foreign law to any action brought concurrently with an action arising under the Convention.

(3) Wrongful Death under the Convention

It is settled law in this Circuit that the Convention creates a cause of action for wrongful death. *Lockerbie*, 928 F.2d at 1273; *see also Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). After *Lockerbie*, the federal common law of torts governs the right to wrongful death recovery. 928 F.2d at 1279-80. Left open for decision is the question of what elements of damages are available under this wrongful death action. The parties agree that plaintiff may recover for loss of support, loss of services, loss of inheritance, loss of nurture and funeral and burial expenses. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 583-591 (1974). The parties, however, disagree on whether plaintiff may recover for loss of society and loss of consortium.

Given the location of the crash, the appropriate analog here for determining the elements of damages is maritime law. *Cf. Eichler v. Lufthansa*, 794 F.Supp. 127, 130 (S.D.N.Y. 1992) (stating that "[t]he federal common law of tort is frequently drawn from the general maritime law.") Specifically, the Supreme Court has indicated that federal courts should exercise their admiralty jurisdiction in cases involving commercial airplane crashes on the high seas. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 271 n.20 (1972). However, in *Executive Jet*, a case that did not involve the Convention, the Court also noted that, in contexts other than tort, "matters

with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft, whether over land or water." *Id.* at 270.

The Court's direction to apply DOHSA to airplane crashes on the high seas on the one hand, and its reluctance to extend the full body of admiralty law to aviation accidents on the other, can be accommodated under the holding of *Lockerbie*. In fashioning federal common law, courts may be guided by appropriate statutes without adopting any in their entirety. *See Moragne v. State Marine Lines*, 398 U.S. 375, 406-408 (1970) *Miles v. Apex Marine Corp.*, 111 S.Ct. at 325-26. However, as noted above, once the Convention gives rise to a cause of action only those statutes that do not conflict with the Convention may be applied. And although certain components of admiralty law are ill-suited to the aviation context (*e.g.*, maritime liens, captures and prizes, cargo damage claims for salvage, and the general average), such principles as wrongful death damages and the relevant beneficiaries are applicable to general tort law. We therefore find maritime law to be the most appropriate source of law for the determination of damages when airplane accidents occur on the high seas.[12]

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[12] To some degree this result runs afoul of the Second Circuit's emphasis on uniformity in *Lockerbie*. If the airplane accident were to have occurred on land or in territorial waters another statute with different damage provisions might provide the proper analog. *See e.g., Gaudet*, 414 U.S. at 587-588 (noting that, contrary to DOHSA, the clear majority of states and the humanitarian policy of the maritime law both favor recovery for loss of society in territorial waters); *Berry v. City of Muskogee*, 900 F.2d 1489, 1506-07 (10th Cir. 1990) (holding that federal common law under the Civil Rights Act, 42 U.S.C. § 1983, allows for recovery of loss of society); and *Giglio v. Farrell Lines Inc.*, 424 F.Supp. 927, 929-30 (S.D.N.Y. 1977) (holding that the common law requires that loss of society recovery be available under The Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 903(a)).

However, this inconsistency is not troubling. First, the inconsistency is minor in that most federal statutes provide basically

Given that maritime law provides the appropriate analog here, DOHSA should be the court's primary guide where death occurs on the high seas. *Mobil Oil v. Higginbotham*, 436 U.S. 618, 624 (1978). The Court in *Higginbotham* stated that "both because of the interest in uniformity and because Congress' considered judgment has great force in its own right," courts should defer to DOHSA in determining the elements of recovery in a wrongful death action on the high seas. *Id.*; *Miles*, 111 S.Ct. at 325.

In re Air Crash near Honolulu, Hawaii on February 24, 1989 provides additional support for our conclusion that a court should look to DOHSA to set the parameters for wrongful death recovery on the high seas. 783 F.Supp. 1261 (N.D.Cal. 1992). That case raised the same issue we must resolve: namely, what measure of damages should be applied to a wrongful death claim arising under the Convention where the fatalities occurred outside territorial waters of the United States. Looking to "analogous internal law," the district court held that DOHSA was the directly applicable wrongful death statute. *Id.* at 1265.

DOHSA compensates only for pecuniary losses which do not include awards for loss of society. *Higginbotham*, 436 U.S. at 622. Accordingly, under appropriate federal common law plaintiff cannot recover for loss of society and the related claim for loss of consortium.

(4) Survival Actions under the Warsaw Convention

Although it is settled law in this Circuit that the Convention creates a cause of action for wrongful death, *Lockerbie*, 928

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similar relief. Moreover, the inclusion of damages such as loss of society in other actions may not have great practical significance. *Higginbotham*, 436 U.S. at 624 n.20; *Tallentire*, 477 U.S. at 233. Certainly the significance is not of a magnitude to compel courts to discount the considered judgment of Congress in enacting differing tort legislation. Second, our holding gives effect to both the Convention and DOHSA in so far as they do not conflict. *U.S. v. Palestine Liberation Organization*, 695 F.Supp. 1456, 1464 (S.D.N.Y. 1988).

F.2d at 1270, few cases have addressed whether survival actions arise under the Convention. However, those cases that have addressed the question have found that the Convention provides for survival actions which include recovery for pre-death pain and suffering. *TWA*, 778 F.Supp. at 636; *Honolulu*, 783 F.Supp. at 1265.

In *TWA*, a post *Lockerbie* opinion, Judge Weinstein addressed the question of whether the Convention provided for recovery for pre-death pain and suffering. After determining that pre-death pain and suffering is an element of survival damages, Judge Weinstein reviewed the current state of federal tort law and found that federal tort statutes overwhelmingly provide for survival recovery.[13] *Id.* at 632-636. Specifically Judge Weinstein looked to the Federal Employee's Liability Act, the Federal Torts Claims Act, the Longshore and Harbor Workers' Compensation Act, the Jones Act the Civil Rights Act and DOHSA and found that "some kind of recovery for conscious pain and suffering is permissible under each of the federal statutes." *TWA*, 778 F.Supp. at 636. *See also Honolulu*, 783 F.Supp. at 1265 (adding that general maritime law also permits recovery for pre-death pain and suffering.) In addition, an analysis of state tort law revealed virtual unanimity in allowing for recovery of survival damages in a death action. *TWA* at 631; *Honolulu*, 783 F.Supp. at 1265. Using those lodestars, the court held that the federal common law of torts clearly recognizes a survival component of a cause of action arising under the Convention.[14]

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[13] In his analytical approach, Judge Weinstein took direction from the Supreme Court's analysis in *Moragne*, 398 U.S. at 375. In *Moragne*, the Supreme Court held for the first time that general maritime law provided for a cause of action for wrongful death. In recognizing a non-statutory wrongful death action, the Court relied heavily on the prevalence of such recovery in federal statutory schemes as well as state law. *Id.* at 390.

[14] Judge Weinstein also noted that a common law survival right is engrafted onto DOHSA in the same manner that it would become part of the federal common law under the

Admittedly, the factual circumstances here differ from those in *TWA*. Neither party in *TWA* could invoke general maritime law or DOHSA, since the underlying accident took place over land. However, a more direct analysis is precluded by the Supreme Court's declination to resolve the question of whether general maritime law recognizes a survival claim, *Miles*, 111 S.Ct. at 327. Thus, without a clearer indication of the availability of survival actions under general maritime law, federal common law must be ascertained from a broader range of analogous federal statues, and, to the extent necessary, the prevailing state law. *Cf. Moragne*, 398 U.S. at 390. The statutes reviewed by Judge Weinstein are representative of this broader field. Borrowing from Judge Weinstein's comprehensive review, we find overwhelming evidence that the federal common law of torts provides for a survival action that includes recovery for pre-death pain and suffering.[15]

Convention. *TWA*, 778 F.Supp. at 635-636 ("Properly construed, [DOHSA] . . . lead[s] to allowance for pain and suffering after injuries but before death.") Further, he also emphasized that the process of fashioning federal common law under the Convention does not actually involve applying DOHSA and, thus, DOHSA cannot inhibit the recognition of a survival action under "Convention treaty common law." *Id.* at 636.

[15] Defendant argues that the federal common law in this case is embodied entirely by DOHSA. Supplemental Memorandum in Support of KAL's Motion Regarding the Applicable Law to the Determination of Damages p. 7 ("In this action . . . DOHSA expressly applies and exclusively controls the measure of damages and procedure as to all actions for deaths occurring on the high seas.") In addition to rejecting KAL's analysis of the extent to which DOHSA represents federal common law, we disagree with KAL's reliance on DOHSA as an exclusive remedy.

Admittedly, by its own terms, DOHSA makes no specific provision for survival recovery. 46 U.S.C. App. § 761; *Miles*, 111 S.Ct. at 327. But neither the language of the statute nor its leg-

(5) Federal Statutory Causes of Action

Plaintiff has asked for a ruling that Korean law applies to its cause of action arising under DOHSA.[16] Plaintiff relies on Section 4 of DOHSA which provides in relevant part that:

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islative history indicate that Congress intended DOHSA to be the definitive measure of recovery for death on the high seas. *See Moragne*, 398 U.S. at 400. Indeed, several courts have addressed the preclusive effect of DOHSA and have rejected arguments analogous to those advanced by KAL. *See, e.g., Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1349 (9th Cir. 1987), *cert. denied*, 493 U.S. 871 (1989) (holding that plaintiff can recover for pre-death pain and suffering in actions brought under Jones Act and DOHSA); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 894 (5th Cir. 1984) (reasoning that DOHSA is preemptive only on those issues specifically addressed by it and holding that general maritime survival action can be brought with DOHSA wrongful death action); *Deniston v. Boeing Co.*, 87-Cv-1205, 1991 U.S. Dist. LEXIS 3440 (N.D.N.Y. March 22, 1991) (holding that DOHSA may be supplemented by a limited general maritime survival claim for pre-death pain and suffering); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F.Supp. 1277, 1284 (W.D. Pa. 1983) (same).

In addition, we do not share KAL's concern that our holding will eviscerate DOHSA. The Convention was intended to be a framework for a uniform scheme of international aviation law. As a non-admiralty claim, the common law survival action does not present the same danger to DOHSA's mandate as the general maritime or state wrongful death law claims at issue in *Higginbotham* and *Tallentire*. Indeed, the Convention's scheme overlaps with DOHSA and admiralty law only in the limited circumstances that exist in the current case. This limited overlay cannot be said to threaten the efficacy of DOHSA's limitations on recovery for other maritime death actions.

[16] In an earlier proceeding Judge Robinson held that the plaintiffs' Convention based wrongful death actions could proceed concurrently with their DOHSA actions. *KAL*, 704 F.Supp. at 1155. Since we find it unnecessary to decide whether *Lockerbie's* holding that the Convention provides an exclusive

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act . . . occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, by any statute of the United States to the contrary notwithstanding.

46 U.S.C. App. § 764. This substantive savings clause preserves for plaintiffs a right to plead a foreign cause of action that provides remedies that are inconsistent with those available under DOHSA. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986). Plaintiff argues, that Section 4 allows her to bring concurrent claims under foreign law that would supplement the recovery available under DOHSA. Plaintiff's Memorandum in Support of the Application of Korean Law for Damages Recoverable p.7. Of significance here, is plaintiff's claim that, under Korean law, the decedent's family members are entitled to compensation for their mental anguish and grief suffered on account of the decedent's death.

Defendant offers a contrary interpretation of Section 4. KAL argues that the provision merely permits a federal court to apply a foreign wrongful death law that is inconsistent with DOHSA if the court determines that foreign law is the proper choice of law to govern the litigation. KAL's Memorandum in Opposition to the Application of Korean Law for Damages Recoverable p.7 (citing *Bergeron v. Koninklijke Luchtvaart Maatschappij*, 188 F.Supp. 594 (S.D.N.Y. 1960). *See also In re Air Crash Disaster near Bombay, India on January 1, 1978*, 531 F.Supp. 1175 (W.D. Wa. 1982).

We do not need to resolve this conflict[17] because either party's interpretation of Section 4 creates a possibility that a

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cause of action *vis a vis* state claims should be extended to independent federal claims, we will address plaintiff's motion on the assumption that both causes of action can proceed concurrently.

[17] Were the issue squarely before us, we would feel that the weight of authority and better reasoned opinions support

foreign law cause of action could be brought concurrently with a Convention cause of action. The Second Circuit's holding in *Lockerbie* that the Convention preempts state law and state choice of law rules requires the rejection of such a conclusion. *Lockerbie*, 928 F.2d at 1275-76. *Lockerbie's* expressed need for uniformity in the laws governing carrier liability and a need for certainty in the application of those laws would be frustrated by the availability of foreign causes of action for death and injuries suffered by passengers on international flights.

Specifically, in *Lockerbie*, the court predicted that the assertion of diversity jurisdiction would lead to the inconsistent application of law to the claims before the court. *Id.* at 1275. A parallel possibility exists if Section 4 is applied. Since certain choice of law factors vary by plaintiff, *Lauritzen v. Larsen*, 345 U.S. 571 (1953) (engaging in federal choice of law analysis), performance of a choice of law analysis results in a likelihood that the applicable law would differ from plaintiff to plaintiff.

The Second Circuit was also concerned that the result of the choice of law analysis could not be anticipated with any certainty. *Lockerbie*, 928 F.2d at 1275. Once again, if the plaintiff's argument is accepted, the determination of what law would apply under DOHSA cannot be made with certainty, because the balancing of the various choices of law elements can alter the predictability of the airline's liability.

Moreover, the court stated that the complexity of applying competing substantive laws would defeat the Convention's

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KAL's view. Although the issue does not appear to have been addressed by any Circuit Court, KAL's position is entirely consistent with Congress' intent in enacting DOHSA. *Miles*, 111 S.Ct. at 321 (stating that DOHSA was enacted to provide a wrongful death action where none had existed previously and DOHSA did not apply to state territorial waters because state law was sufficient). There is no similar support in case law or policy to support plaintiffs position. *Bergeron*, 188 F.Supp. at 597.

goals. *Id.* In the present case the federal law—DOHSA—conflicts with Korean law. The court is then presented with the problem of whether a plaintiff can choose between the federal or foreign cause of action. Therefore, allowing the foreign cause of action to be maintained in cases arising under the Convention would result not only in the inconsistent application of law to the same accident, but also would cause enormous confusion for airlines in predicting the law upon which they would be called to respond. The potential for such inconsistency and uncertainty would undermine the uniformity that the Convention seeks to engender. *Cf. id.* at 1276.

In addition to the lack of uniformity created by allowing foreign law causes of action to proceed concurrently with Convention claims, the law that the plaintiff seeks to apply conflicts with the federal common law.[18] There is substantial authority that compensation for the mental anguish and grief suffered by the surviving family members is not compensable under federal law. *See, e.g, Gaudet*, 414 U.S. at 585 n.17; *Red Star Towing & Transport Co., Inc. v. The "Ming Giant"*, 552 F.Supp. 367, 377 (S.D.N.Y. 1982). Moreover, plaintiff was unable to point to a single case applying federal law that allowed such recovery. Although some states allow for limited statutory recovery for survivor's grief, these states are in the clear minority. 1 Speiser, § 3:53. As mentioned above, in the case of conflict, the Convention would supersede the substantive savings clause of DOHSA. Therefore, we deny plaintiff's motion for a ruling that Korean law governs the availability of survivor's recovery.

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[18] Neither party has argued here that the application of federal common law under the Convention includes federal choice of law rules. If that were the case, it is conceivable that we would be called upon to apply Korean law to the Convention cause of action. However, the Second Circuit in *Lockerbie* indicated that a choice of law analysis would not be appropriate in an action brought under the Convention. 928 F.2d at 1279 ("we adopt substantive federal common law as the law governing the cause of action under the Warsaw Convention") (emphasis added).

CONCLUSION

For the reasons set forth above, these pre-trial motions of KAL are denied. First, pursuant to Judge Leval's order and the conditions of the parties' consent, this case will be tried simultaneously to a jury and to the court. Second, this court holds that the federal common law provides for both wrongful death and survival actions. In that regard, since the Death on the High Seas Act is the analogous federal wrongful death statute, plaintiff may not recover for loss of society. In addition, the federal common law of tort survival action includes recovery for pre-death paint and suffering.[19] Finally, plaintiff's motion to apply Korean law to the recovery of survivor's grief is denied.

IT IS SO ORDERED.

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[19] Obviously, plaintiff must still present sufficient evidence to prove that recovery for pain and suffering is warranted. The court finds it instructive that under FELA, in order for a representative to recover for the deceased's pain and suffering, three essential elements must be proven: survival, consciousness, and pain. *See Anderson v. Whittaker Corp.*, 692 F.Supp. 764, 773-74 (W.D. Mich. 1988).

Relevant Provisions of The Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.